

Ronald Wilcox, Esq., 176601
 2160 The Alameda, First Floor, Suite F
 San Jose, CA 95126
 Tel: (408) 296-0400
 Fax: (408) 296-0486

O. Randolph Bragg, IL Bar No. 6221983
 Craig M. Shapiro, IL Bar No. 6284475
 HORWITZ, HORWITZ & ASSOCIATES
 25 East Washington Street, Suite 900
 Chicago, IL 60602
 Tel: (312) 372-8822
 Fax: (312) 372-1673

ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

NANCY CAMPOS, an individual, on
 behalf of herself and all others similarly
 situated,

Plaintiff,

v.

WESTERN DENTAL SERVICES, INC.
 and JENNIFER ROTH,

Defendants.

Case No. 05-02119 RMW

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION TO DISMISS DEFENDANT'S "CONDITIONAL" COUNTERCLAIM

The Honorable Ronald M Whyte

Date: September 2, 2005

Time: 9:00 am

Location: 280 S. 1st St. San Jose, CA

Plaintiff Nancy Campos respectfully presents the following Memorandum of Law in support of Plaintiff's Motion to Dismiss the Counterclaim contained in the Answer of Defendant Western Dental Services, Inc., and Jennifer Roth filed on July 8, 2005.

I. FACTUAL BACKGROUND

Plaintiff Nancy Campos brought her lawsuit against Defendants Western Dental Services, Inc., a corporation, and Jennifer Roth, an individual, alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. §§1692, *et seq.* (hereinafter "FDCPA") and California's Rosenthal Fair Debt Collection Practices Act, Civil Code 1788 *et seq.* (hereinafter, "State Act"), which prohibit debt collectors from engaging in abusive, deceptive and unfair practices. Both

1 Defendants Answered Plaintiff's Class Action Complaint on July 8, 2005. Also contained within
2 Defendants' Answer is Defendant Western Dental Services, Inc.'s "Conditional" Counterclaim
3 Against the Putative Class. Hereinafter, "Defendant" will refer only to Defendant Western
4 Dental Services, Inc., the sole Counterclaimant.

5 Defendant's counterclaim deals solely with an alleged contract claim between the
6 Defendant and the Plaintiff and members of the putative class, which arose separate from the
7 collection conduct challenged by Plaintiff in this case. Because the Counterclaim only deals
8 with a contract claim under state law, does not raise out of the same transaction as the Plaintiff's
9 claims, and no independent federal basis was asserted or exists for the filing of said
10 Counterclaim in this Court, the Counterclaim is only permissive, Fed. R. Civ. P. 13(b), and must
11 be dismissed.

12 **II. ARGUMENT**

13 **A. DEFENDANT'S COUNTERCLAIM IS PERMISSIVE** 14 **UNDER FED. R. CIV. P. 13 AND SHOULD BE DISMISSED.**

15 The determination of whether the counterclaim should be dismissed requires an
16 analysis of the requirements of Rule 13 of the Federal Rules of Civil Procedure. Rule 13(a) and
17 (b) differentiate between compulsory counterclaims, which must be made a part of the case, and
18 permissive counterclaims, which the court should dismiss if no independent federal jurisdiction
19 exists: Rule 13 provides:

20 (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any
21 claim which at the time of serving the pleading the pleader has against any
22 opposing party, if it arises out of the transaction or occurrence that is the subject
23 matter of the opposing party's claim and does not require for its adjudication the
24 presence of third parties of whom the court cannot acquire jurisdiction..."

23 (b) Permissive Counterclaims. A pleading may state as a counterclaim any claim
24 against an opposing party not arising out of the same transaction or occurrence
25 that is the subject matter of the opposing party's claim.

25 As stated above, Defendant's Counterclaim arises from an alleged breach of contract by
26 Plaintiff/Putative Class, not the collection practices of Defendant, which are the subject of this
27 FDCPA and State Act litigation. Under Rule 13, Defendant's Counterclaim is not mandatory;

1 indeed, it is permissive because it did not arise out of the same transaction or occurrence, *i.e.*, the
2 abusive debt collection activity claimed by Plaintiff/Putative Class in this lawsuit.

3 **B. DEFENDANT'S COUNTERCLAIM IS NOT COMPULSORY**

4 Defendant seeks to bring claims entirely not at issue in this matter under the rubric of its
5 Counterclaim. The purported contracts between Plaintiff/Putative Class and Defendant did not
6 arise from Defendant's debt collection practices challenged by the present litigation. Rather, the
7 contracts between Defendant and Plaintiff/Putative Class were created long before Defendant
8 began its collection attempts. Thus, Defendant's counterclaim is not compulsory.

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10 Various federal courts have addressed the situation of counterclaims for the underlying
11 debt being alleged against deceptive practices arising under the FDCPA. As a district court
12 within the Ninth Circuit has stated, "Every published decision directly addressing the issue in
13 this case has found FDCPA lawsuits and lawsuits arising from the underlying contractual debt
14 are not compulsory counterclaims." *Hart v. Clayton-Parker and Associates, Inc.*, 869 F.Supp
15 774, 777 (D.Ariz. 1994) (citations omitted). "The court thus finds that the FDCPA claim and the
16 claim on the underlying debt raise different legal and factual issues governed by different bodies
17 of law. As such, the court concludes that defendant's state-law counterclaim is not logically
18 related to plaintiff's complaint and is therefore not a compulsory counterclaim." *Id.* at 777-78.
19 Also see: *Taylor v. Bryant, Inc.*, 275 F.Supp.2d 1305 (D.Nev. 2003) and *Baker v. G.C. Services*,
20 1979 U.S. Dist. LEXIS 15351, 4-5 (D. Or. 1979), *aff'd* on other grounds 677 F.2d 775 (9th Cir.
21 1982). In *Leatherwood v. Universal Business Service Company*, 115 F.R.D. 48, 49 (W.D.N.Y.
22 1987), the district court concluded that the contract "claim against the plaintiff to collect the debt
23 does not possess the characteristics associated with a compulsory counterclaim." "All reported
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1 decisions on the issue have found that a defendant's counterclaims for payment of an overdue
 2 debt are distinct from, and not logically related to, a plaintiff's FDCPA claim based on improper
 3 debt collection practices." *Berrios v. Sprint Corp.*, 1998 U.S. Dist. LEXIS 6579, *26 (E.D.N.Y.,
 4 Mar. 16, 1998). Similarly, federal courts have held that counterclaims for the collection of
 5 underlying debts are not compulsory in litigation brought under the federal Truth in Lending
 6 Act. *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1292 (7th Cir. 1980); *Whigham v.*
 7 *Beneficial Finance Co.*, 599 F.2d 1322, 1324 (4th Cir. 1979).

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 9 Thus, Defendant's Counterclaim is not a compulsory Counterclaim.

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 11 **C. INDEPENDENT FEDERAL JURISDICTION IS REQUIRED**
 12 **FOR PERMISSIVE STATE LAW COUNTERCLAIMS.**

13 "A counterclaim that is not compulsory is 'permissive' under Fed.R.Civ.P. 13(b)." *Ayers*
 14 *v. National Credit Management Corp.*, 1991 U.S. Dist. LEXIS 5629, *6 (D.Del., Apr. 25, 1991).
 15 The supplemental jurisdiction statute, 28 U.S.C. §1367(a), subject to exceptions not applicable
 16 here, now provides that "in any civil action of which the district courts have original jurisdiction,
 17 the district courts have supplemental jurisdiction over all other claims that are so related to the
 18 claims in the action within such original jurisdiction that they form part of the same case or
 19 controversy under Article III of the United States Constitution." Federal courts have
 20 supplemental jurisdiction over compulsory counterclaims, but permissive counterclaims require
 21 their own jurisdictional basis. *Taylor*, *supra* at 1306; *Hart v. Clayton -Parker and Assoc., Inc.*,
 22 *supra* at 776.

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 24 Because permissive counterclaims by definition do not arise from the same
 25 transaction or occurrence as the main claim, in most cases, a court will not have supplemental
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jurisdiction over the counterclaim. Cabrera v. Courtesy Auto, 192 F.2d 1012 (D.Neb. 2002),
citing 3 James Wm. Moore, *Moore's Federal Practice* § 13.110[2] (3rd ed.2001). Federal Courts
 have consistently held that a Rule 13(b) counterclaim must be supported by independent grounds
 of federal jurisdiction. Cabrera, supra at 1019, citing Blue Dane Simmental v. American
Simmental Assoc., 952 F.Supp. 1399,1403 (D.Neb. 1977) (other cites omitted).

In a variety of contexts decided after enactment of Section 1367, courts have continued to
 embrace the prior compulsory/permissive counterclaim jurisdictional analysis. See Shamblin v.
City of Colchester, 793 F.Supp. 831, 833-834 (C.D.Ill. 1992); Mille Lacs Bank of Indians v.
State of Minnesota, 853 F.Supp. 1118, 1146 (D.Minn. 1994); International Association of Heat
& Frost v. Thermo-Guard, 880 F.Supp. 42, 45 (D.Mass. 1995). Accordingly, enactment of the
 supplemental jurisdiction statute does not dictate an analysis different from that under Fed. R.
 Civ. P. 13.

The debt collector “cannot maintain its Counterclaim under Rule 13(b) either, because as
 a permissive Counterclaim it must be supported by independent grounds for federal jurisdiction.”
Kuhn v. Account Control Technology, Inc., 865 F.Supp 1443, 1446 (D.Nev. 1994) (citation
 omitted). Defendant’s counterclaim does not have, nor does it allege, any independent grounds
 for which federal jurisdiction exists over its state law contract claim. Therefore, Defendant’s
 Counterclaim for the allegedly owed debts should be dismissed.

**D. THE WEIGHT OF AUTHORITY STATES THAT A COUNTERCLAIM
 TO AN FDCA CLAIM IS PERMISSIVE AND SHOULD BE DISMISSED.**

Over ten years ago in Hart v. Clayton -Parker and Assoc., Inc., supra, a case with the
 issue nearly identical to the present case, the court noted that “every published decision directly

1 addressing the issue in this case had found that FDCPA lawsuits and lawsuits arising from the
2 underlying contractual debt are not compulsory counterclaims.” Hart v. Clayton -Parker and
3 Assoc., Inc., supra at 777. The Eighth Circuit held in Peterson v. United Accounts, Inc., 638
4 F.2d 1134 (8th Cir. 1981), that the FDCPA claim at issue in federal court was a permissive, not
5 compulsory, counterclaim in the state court proceedings to collect the debt.
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7 The Peterson court addressed the issue in the context of an FDCPA claim brought
8 in federal district court after the debtors had been sued in state court to collect a debt. The
9 district court dismissed the FDCPA action on the assumption that it was a compulsory
10 counterclaim in the state court case. Id. at 1035. The Eighth Circuit reversed, holding that the
11 FDCPA claim is not a compulsory counterclaim in a state court action to collect the debt. Id.
12 The Eighth Circuit relied upon the Fourth Circuit decision in Whigham v. Beneficial Fin. Co. of
13 Fayetteville, 599 F.2d 1322, 1323-34 (4th Cir. 1979) and the Seventh Circuit's decision in
14 Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980), *rev'd on other grounds*, 452
15 U.S. 205 (1981), to conclude that the federal FDCPA claims and the debt claims are not logically
16 related since the federal FDCPA claims do not involve the obligations created by the underlying
17 contract. The Eighth Circuit observed
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21 The purpose of the Fair Debt Collection Practices Act includes the elimination of
22 abusive debt collection practices by debt collectors, insuring that those debt
23 collectors who refrain from using abusive practice are not competitively
24 disadvantaged, and the promotion of consistent state action to protect consumers
25 against debt collection abuses. 15 U.S.C. § 1692(e).

26 Peterson v. United Accounts, Inc., supra at 1137 n9. In ruling that a FDCPA claim and a debt
27 counterclaim lack any shared realm of genuine dispute and that an FDCPA counterclaim is not
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1 compulsory, the Eighth Circuit stated:

2 In the instant case, the circumstances giving rise to the original debt are separate
3 and distinct from the collection activities undertaken by United Accounts, Inc.
4 While the debt claim and the FDCPA counterclaim raised here may, in a technical
5 sense, arise from the same loan transaction, the two claims bear no logical
6 relation to one another. Although there is some overlap of issues raised in both
7 cases as a result of the defenses raised in the state action, the suit on the debt
8 brought in state court is not logically related to the federal action initiated to
9 enforce federal policy regulating the practices for the collection of such debts.

10 Peterson v. United Accounts, Inc., supra at 1137.

11 Other jurisdictions have consistently adopted the same reasoning. In an FDCPA class
12 action, Orloff v. Healthcare Business Services, 2003 U.S. Dist. LEXIS 15466 (E.D.Pa. Aug. 20,
13 2003), the district court held that it is clear that the issues of fact and law raised by the plaintiffs'
14 claim under the FDCPA are completely different than those raised by the defendants' claim for a
15 state law debt action. The evidence to prove the FDCPA claim has no relation to the evidence
16 needed to prove the state debt claim. Id. at *7. The defendants' right to pursue their state claim
17 is not dependent on the outcome of the federal litigation. Id. Evidence of the plaintiffs' alleged
18 failure to pay has no relevance on the issue of whether the defendants' actions in collecting the
19 debt violated federal law. Id. See Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982).

20 In Taylor v. Bryant, Inc., supra at 1306-7, the court dismissed the defendant's breach of
21 contract counterclaim to an FDCPA claim for lack of jurisdiction pursuant to Fed.R.Civ.P.
22 12(b)(1). Reasoning that the such a counterclaim is only permissive the district court found that
23 the plaintiff's FDCPA claim relates to the alleged use of abusive debt collection practices while
24 the defendant's counterclaim encompasses a private duty under state law requiring broad proof
25 of facts to establish the existence and performance of a contract, a breach of the contract by the
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1 debtors, and monetary damages resulting therein. Id. at 1307.

2 Dismissing the debt collector's counterclaim, the U.S. District Court for the Eastern
3 District of Pennsylvania stated:
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5 Although the claims of Plaintiff and Defendants are both based upon Plaintiff's
6 receipt of medical services, it is clear that the issues of fact and law raised by
7 Plaintiff's claims under the FDCPA, FCEUA and CPL are completely different
8 than those raised by Defendants' claim for breach of contract. Plaintiff's claims
9 involve issues of statutory compliance. Defendants' counterclaim is simply a
10 state law debt collection claim. The evidence needed to prove violations of the
11 FDCPA, FCEUA and CPL has no relevance whatsoever to the alleged breach of
12 contract claim. Moreover, the evidence needed to prove breach of contract does
13 nothing to establish violations of the FDCPA, FCEUA and CPL. In addition, the
14 Defendants' counterclaim would not be subject to the defenses of res judicata in a
15 subsequent action. Even if Defendants violated the FDCPA, FCEUA and CPL,
16 they may pursue a breach of contract claim against the Plaintiff in state court to
17 collect this debt. The Defendants' right to pursue their state claim is independent
18 of the outcome of this litigation. Evidence of plaintiff's failure to pay Defendants'
19 money owed to them has no relevance on the issue of whether the Defendants'
20 actions in collecting the debt violated federal law.

21 Orloff v. Syndicated Office Systems, Inc., 2003 U.S. Dist. LEXIS 15466, *7-8 (E.D.Pa. Aug. 20,
22 2003). Allowing a defendant in a FDCPA case to assert unrelated counterclaims would frustrate
23 the purposes of the Act by giving plaintiffs a disincentive to pursue their rights with a resulting
24 chilling effect on persons who otherwise might and should bring suits under the FDCPA. See
25 also, Baker v. G.C. Services, 1979 U.S. Dist. LEXIS 15351, 4-5 (D. Or. 1979), aff'd on other
26 grounds 677 F.2d 775 (9th Cir. 1982)(Not only does traditional analysis compel the conclusion
27 that these counterclaims are permissive, but to hold otherwise would frustrate the objectives of
28 the Fair Debt Collection Practices Act).

29 In the case Evans v. American Credit Systems, Inc., 2003 U.S. Dist. LEXIS 22433
30 (D.Neb. December 10, 2003) the District Court likewise concluded that it did not possess

1 jurisdiction over independent state law claims which were permissive counterclaims to a FDCPA
2 action. As the Court stated, “[t]his court finds that Peterson is still relevant and controlling...
3 Unlike a compulsory counterclaim, a permissive counterclaim requires an independent basis of
4 federal jurisdiction to retain jurisdiction over the matter.” Id. at *4. The Court then went further
5 to find that the Defendant’s state law claims did not confer jurisdiction to the court and
6 dismissed Defendant’s state law counterclaims. Id. at *4-5.

8 Applying the tests of Peterson and the other precedents cited above to Defendant’s
9 instant Counterclaim, it is clear that Defendant’s Counterclaim is permissive and should be
10 dismissed. The allegations against Plaintiff and the putative class members with respect to the
11 alleged debt may technically arise out of the same transaction, but the similarity stops there. The
12 counterclaim is otherwise unrelated to Plaintiff’s FDCPA and State Act claim, which allege that
13 Defendant engaged in unlawful collection tactics. Plaintiff’s claims and Defendant’s
14 Counterclaim will present entirely different legal, factual, and evidentiary questions. Peterson v.
15 United Accounts, Inc., supra at 1137. Different witnesses and discovery will be needed to prove
16 each party’s claims. The facts relevant to Plaintiff’s FDCPA and State Act claims will have no
17 bearing on allegations regarding the alleged debt; thus, different evidence will be needed to
18 support each claim. Id. For example, in the present case, the FDCPA is a strict liability statute,¹
19 while the counterclaim will require proof of an existence of a contract, the breach of a contract,
20 and monetary damages resulting therefrom.

21 Furthermore, Plaintiff’s claims that the collection agency violated the FDCPA and State
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27 ¹ See: Picht v. Jon R. Hawks, Ltd., 236 F.3d 446, 451 (8th Cir. 2001).

1 Act are not sufficiently related to the underlying debt to allow the Counterclaim. Plaintiff's
2 FDCPA and State Act claims do not dispute the validity of the debt. Instead, this litigation
3 alleges that Defendant's debt collection tactics violated of the FDCPA and State Act. As a
4 result, Defendant's Counterclaim does not arise from the same transaction as Plaintiff's claims.
5

6 As such, Defendant's Counterclaim should be deemed permissive and dismissed for want
7 of federal jurisdiction.

8 **E. CASES CITED BY DEFENDANT ARE INAPPLICABLE.**
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10 In its Counterclaim, Defendant cites two cases in support of its assertion that the issue of
11 this Court's jurisdiction over the Counterclaim must wait until after a ruling on class
12 certification. However, these cases are inapplicable to the instant case.

13 In Jones v. Ford Motor Credit Co., 358 F.3d 205 (2d Cir. 2004), the Second Circuit
14 determined that, if the Court must consider either of the exceptions contained in 28 U.S.C. §
15 1367(c)(2) or (4), then the Court must wait until after deciding class certification to make its
16 jurisdictional ruling. Jones, supra at 215. In the instant case, Plaintiff does not assert that this
17 Court should deny jurisdiction based on Subsection 1367(c).
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19 In Channell v. Citicorp National Services, Inc., 89 F.3d 379 (7th Cir. 1996), the
20 defendant filed a counterclaim *after* the plaintiff's class was certified. Channell, supra at 384.
21 Plaintiff modestly reminds the Court that class certification in the instant case has not been
22 decided. The Seventh Circuit, in finding that the lower court had jurisdiction over the
23 permissive counterclaim, later states,
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25 Each class member's claim against [the defendant] depends on the lease, and
26 indeed on the same clause of the lease that creates [the defendant]'s claim for a
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1 termination charge. *** But the parties, the lease, the clause, and even the
2 termination are constants ... Signing and termination alike therefore were integral
3 to this case even before [the defendant] launched its counterclaim.

4 Id. at 385-6. In the instant case, the claims of Plaintiff and the putative class do not depend on
5 the contract forming the basis of Defendant's Counterclaim. The contract and any clauses within
6 it are not constants in this case. Nor is signing the contract an integral, or even related, part of
7 Plaintiff's case. Nothing in or about the contract relates to the claims of Plaintiff and the
8 putative class. Indeed, the claims of Plaintiff and the putative class involve only the policies and
9 practices of Defendant in attempting to collect debts.

11 Also of significance, immediately before citing Jones and Channell, Defendant
12 incorrectly frames the jurisdiction of its Counterclaim as only possibly being defeated by
13 Subsection 1367(c), under which a decision on Plaintiff's instant Motion may wait until after
14 class certification. However, Plaintiff has not asserted that this Court should deny jurisdiction
15 based on 28 U.S.C. § 1367(c). Indeed, Plaintiff states, supra, that Subsection 1367(a) is subject
16 to exceptions, § 1367(c), not applicable here. Defendant, in its Counterclaim, deceptively does
17 not cite Subsection 1367(a) as a bar to jurisdiction.

19 **III. CONCLUSION**

20
21 Defendant's Counterclaim for the recovery of alleged debts is not a compulsory
22 counterclaim. The Counterclaim is permissive, and no independent federal jurisdictional basis
23 exists to hear Defendant's exclusively state law Counterclaim. Accordingly, Plaintiff's Motion
24 to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) should be
25 granted.
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Dated: 7/27/05

/s/Ronald Wilcox

Ronald Wilcox

2160 The Alameda, Suite F, 1st Floor

San Jose, CA 95126

Tel: (408) 296-0400

Fax: (408) 296-0486

O. Randolph Bragg

Craig M. Shapiro

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